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BOOK REVIEWS

THE LAW OF UNFAIR BUSINESS COMPETITION. By Harry D. Nims. New York: Baker, Voorhis & Co., 1909, pp. xlvii, 581.

It was not so long ago that it was supposed that one trader could not compete unfairly with another unless he stole a technical trade mark. A trade mark was considered property which could be possessed by one person to the exclusion of all others and the courts exercised their jurisdiction on the theory of protecting property, and on that theory alone. The relief, of course, was complete, for in the assumption that a mark or brand was an exclusive property right, any use by another was a violation of that right and unlawful.

The legal theory so devised worked beautifully as long as the trade pirate confined himself to stealing technical trade marks, but when he was graduated from this primary grade of commercial thievery and began the crafty imitation of labels, the deceitful use of identifying names and devices not technically trade marks, the courts at first were at a loss to know how to meet the conditions thus created. The exclusive property theory could not be invoked for it was obvious that no exclusive property could be claimed by any trader in the size or shape of his package, the color or appearance of his label, the name of the town where he carried on business or even in his own name. It was equally apparent that business and trade could be stolen by the use by another trader of these things. The courts in their haste to arrest the depredations of the commercial highwaymen did not stop to figure out whether their property theory as applied to technical trade marks was sound, but invented what was supposed to be a new sort of thing which they compendiously termed "unfair competition," and it was asserted that the relief decreed in such cases differed radically from that in cases of infringement of trade marks; that the trade mark cases depended upon property, the unfair trade cases upon fraud. The modern development of the law makes it probable that neither of these postulates is sound. In assuming a trade mark to be property, what a trade mark really is was lost sight of. A trade mark is an outward sign of business good will, it is simply visible reputation, and it is the thing itself, the good will or reputation that is or ought to be the property and not the symbol. Now, this good will or reputation can be represented in many different ways, and not alone by technical trade marks. It is symbolized by any means, whatever they may be, which enable a purchaser to distinguish a particular trader's goods. It makes no difference whether in a particular instance it be color of label, form of goods, appearance of label, personal, geographical, or descriptive name, if any of these things is a means by which a purchaser can and does in fact exercise his choice and distinguish the commercial origin of the article he wants, then the particular feature whatever it may be represents good will, and is just as much entitled to protection as if it were a technical trade mark. This identifying significance is always a matter of evidence. The identifying

significance of a technical trade mark is a matter of presumption, for being arbitrary its only function is to identify. This is the only sound distinction between cases of infringement of technical trade mark and cases of passing off. The only property right involved in either is the property that every trader has in the good will of his business. The question of the intention of an infringer is concededly immaterial in technical trade mark cases and ought to be equally so in "passing off" cases. The question always ought to be not what has the defendant intended, but what has he done. If he has passed off his goods as those of another, the important thing ought to be to put a stop to it rather than to inquire if the passing off was with deliberate fraudulent purpose or with the best intentions in the world. The cases are, however, irreconcilable both on this question¹ and on the property theory of trade marks.²

¹ That actual fraud is an essential element in passing off cases, see: *Elgin National Watch Co. v. Illinois Watch Case Co.*, 179 U. S. 665, 674. See discussion by Judge Whitehouse in *W. R. Lynn Shoe Co. v. Auburn-Lynn Shoe Co. (Me.)* 62 At. 499, 505. *Wrisley v. Iowa Soap Co.*, 122 Fed. 796. *Galena Signal Oil Co. v. Fuller*, 142 Fed. 1002, 1007. *Goodyear v. Goodyear*, 128 U. S. 604. *Lawrence Mfg. Co. v. Tennessee Co.*, 138 U. S. 537, 549.

That actual fraud is not essential, see: *Cellular Clothing Co. v. Maxton & Murray* (1899) A. C. 326; 16 R. P. C. 397, 404. *New England Awl Co. v. Marlboro Co.*, 46 N. E., 386. *Fox v. Glynn*, 78 N. E. 89. *Saxlehner v. Siegel, Cooper Co.*, 179 U. S. 42, 21 Sup. Ct. Rep. 16. *Stuart v. Stewart*, 85 Fed. 778. *R. Heinisch's Sons Co. v. Baker*, 86 Fed., 765, 768. *Cuervo v. Owl Cigar Co.*, 68 Fed. 541, 542. *McCann v. Anthony*, 21 Mo. App., 83; *Price & Stewart Am. Trade Mark Cas.* 1054, 1061. *Liggett v. Hynes*, 20 Fed., 883. *Collinsplatt v. Finlayson*, 88 Fed. 693. *Nesne v. Sundet*, 101 N. W. 490 (an excellent statement of the true rule and a full citation and analysis of cases). *North Cheshire & Manchester Brew. Co. v. Manchester Brewery Co.* (1899) A. C. 83. *Higgins Co. v. Higgins Soap Co.*, 144 N. Y. 462; 39 N. E. 490; 27 L. R. A. 42. *Holmes, Booth & Hayden v. Holmes, Booth & Atwood*, 37 Conn. 278, 296. *Armington v. Palmer*, 42 At. 308, 311, 43 L. R. A. 95. *American Clay Manfg. Co. v. American Clay Manfg. Co. of New Jersey*, 47 At. 936. *Enoch Morgan's Sons v. Whittier-Coburn Co.*, 118 Fed. 657, 661. *Red Polled Cattle Club v. Red Polled Cattle Club*, 78 N. W. 803, 805. *Bissell Chilled Plow Works v. T. M. Bissell Co.*, 121 Fed. 357, 371. *Glucose Sugar Refining Co. v. American Glucose Sugar Ref. Co.*, 56 At. 861. *Viano v. Baccigalupo*, 67 N. E. 641. *Kinnell v. Ballantine*, 26 R. P. C. 12, 19. *Manitowoc Co. v. Wm. Numsen*, 93 Fed. 196.

² That a trade mark is property, see: *Hoyt v. Hoyt*, 143 Pa. St., 623, 22 At. 755. *Lawrence v. Tenn. Co.*, 138 U. S., 537, 549. *Brown v. Seidel*, 153 Pa. 60, 25 At. 1064. *Gaines v. Sroufe*, 117 Fed. 965, 967. *Daviess County Distilling Co. v. Martonini*, 117 Fed. 186, 188. *Gorham Mfg. Co. v. Emery-Bird-Thayer Co.*, 104 Fed. 243. *Galena Signal Oil Co. v. Fuller*, 142 Fed. 1002, 1007.

There is abundant authority holding the contrary: "The word 'property' has been sometimes applied to what has been termed a Trade Mark at common law. I doubt myself whether it is accurate to speak of there being property in such a Trade Mark though, no doubt, some of the rights which are incident to property may attach to it." *Lord Herschel in Reddaway v. Banham* (1896) A. C. 199, 209, 210. 13 R. P. C. 218, 228.

To the same effect are the following cases which hold that a trade mark is not property: *Royal Co. v. Raymond*, 70 Fed. 376, 380. *Cohen v. Nagle*, 76 N. E. 276, 282. *Chadwick v. Covell*, 151 Mass. 190, 194. 23 N. E. 1068, 1069. 6 L. R. A. 839. *Singer Co. v. Loog*, L. R. 18 Ch. D. 412, 413. *Canada Pub. Co. v. Gage*, 3 Can. Com. L. Rep. 119, 129. *Commonwealth v. Ky. Distilleries Co.*, 116 S. W. 766. *Turton v. Turton*, 42 L. R. Ch. Div. 128. *Esher M. R. Collins Co. v. Brown*, 3 Kay & J. 423, 69 Full Reprint 1174.

The next step which ought to follow the acceptance of the doctrine that a trader has a property in the good will of his business, and is entitled to be protected against any device by which this good will or any part of it is being stolen away from him, is that he is also entitled to the custom which would naturally come to him. That he should be protected against any interference with his business by means of which this custom is diverted or prevented. He should be protected against any acts by which his customers are taken away from him, by fraud, actual or constructive; by force, intimidation, threats or even by meddlesome persuasion. It may be a long time before these principles are fully recognized, but recognition of them is bound to come. Mr. Nims in his book "Unfair Competition in Business" has not fully perhaps accepted the theories here advanced, but that he has acted upon them is evident from the fact that in a book entitled "Unfair Business Competition" he has included technical trade marks, passing off by means of personal names, corporate names, simulation of articles themselves, dress or get-up of goods, including labels, wrappers, bottles, cartons, etc., interference with a competitor's contracts and business, libel and slander of business names and reputation, false representation, threats of prosecution, trade secrets and confidential relations.

Mr. Nims' book is the first attempt to treat comprehensively unfair business competition in its broad sense. Previous authors seem to have considered that the subject begins with trade mark infringement and ends there, though some investigators have included chapters under titles such as "Rights analogous to trade marks" and the like, contenting themselves however with a cursory discussion of passing off actions without going into the broader field at all, and, without exception, stating or assuming that unfair competition is the equivalent of passing off and is a branch of the law of trade marks, whereas Mr. Nims' attitude and the true conception of the subject is that "unfair competition" is the genus and trade mark infringement, passing off, interference with competitor's business or contracts, trade libel and the like are but the species.

Mr. Nims' book is correct in theory and excellent in execution. In these days of enormous advertising expenditures, the purpose of which is to establish business good will, represented by brands, trade marks and other identifying indicia and the establishment of business over wide areas and among great numbers of customers, the matter of their protection against assaults has become of the utmost importance, and a book on the subject in a broad way is a necessity. It is fortunate that the first should be as well done as this is. The cases on the subject are nowhere else collected in a single volume so as to be readily accessible, but are scattered through the digests under various headings, such as "Trade Marks and Unfair Competition," "Corporations," "Libel and Slander," "Literary Property," "Injunctions," "Trade Secrets," etc., making the law on the subject difficult of access, and not always recognizable when found, and the search for it in the nature of a missing word contest. Mr. Nims' citation of cases is adequate, though not exhaustive, for instance the list of words held to infringe in sections 135, 136 is not as full as it could be made, though it is

a fairly comprehensive list. It was perhaps not the author's intention to cite exhaustively, for instance the chapter on similarity (Chap. III.) where is discussed the attitude of the ultimate purchaser, the degree of care required of him, his judicially assumed capacity for acquiring and recalling mental images of the article he wants to buy and its identifying features are fully and correctly treated in the text, although a large number of cases where these questions are interestingly and instructively discussed, and which would bear out and illustrate the text are not cited. Here too is a promising field for the "new psychology."

There are also some branches of the general subject which might well have been included in the book which are not directly touched on, for instance the ingenious methods of diverting custom and injuring a competitor, shown in *White v. Mellen* [1894] 3 Ch., 276, [1895] A. C. 154; *Van Horn v. Van Horn*, 52 N. J. Law., 284, 20 Atl. 485. *Tuttle v. Buck*, 119 N. W., 946. *Passaic Print Works v. Ely & Walker Dry Goods Co.*, 105 Fed., 163. *Magnolia Metal Co. v. Tandem Smelting Syndicate*, 17 R. P. C., 477, 485. *Gregory v. Spieker*, 42 Pac. 576. *Singer Co. v. British Empire Co.*, 20 R. P. C., 313.

Mr. Nims' book is, however, such an excellent one and includes so many things not elsewhere adequately discussed, if discussed at all, that the wonder is not that he has omitted a few cognate subjects, but that he has covered an exceedingly wide and almost unexplored territory as thoroughly as he has.

EDWARD S. ROGERS.

A TREATISE ON FACTS OR THE WEIGHT AND VALUE OF EVIDENCE. By Charles C. Moore. In two volumes. Northport, Long Island, N. Y.: Edward Thompson Company, 1908, pp. clxviii, 1612.

Few books published in recent years give evidence of more painstaking research not only in the field of legal literature but in other branches of literature as well, and all have yielded tribute. The Bible is often quoted, as are books of science in many branches. The poets, romancers, philosophers, psychologists, statesmen, orators, journalists, historians, all have furnished their contributions until there is a wealth of material so rich as to be appreciated only by extended examination.

Most of this material was hidden away so as to be of little practical value until we find it gathered, arranged and classified in these two large volumes by Mr. Moore.

The primary object of the author was evidently to make available for the court and practitioner the discussion of judges found in reported cases on questions of fact, on the weight of evidence and the credit of witnesses. But the author has done much more, having gathered largely from other fields as well.

The work is of so unusual a character to be found in a lawyer's office that one might question on first impression whether it ought to be bound in law sheep—whether indeed it is a "law book." That it is a lawyer's book, a useful work for the trial lawyer, is certainly true. *What* uses the